

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1223-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT E. SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Vincent E. Smith appeals from the judgment of conviction entered after he pled guilty to one count of third-degree sexual assault while armed, one count of abduction of a child, and one count of impersonating a peace officer, contrary to WIS. STAT. §§ 940.225(3), 939.63(1)(a)3, 948.30(1)(b)

and 946.70(1),¹ and from the trial court's order denying his motion for postconviction relief. Smith argues that the trial court erred in denying his postconviction motion because: (1) the trial court applied the wrong standard in denying his motion to withdraw his guilty plea prior to sentencing; (2) withdrawal of his guilty plea following sentencing was necessary to correct a manifest injustice; and (3) he was entitled to a *Machner*² hearing on the ineffective assistance of his trial attorney and plea withdrawal issues raised in the motion. We reject Smith's arguments and affirm.

I. BACKGROUND.

¶2 Smith was charged with one count of first-degree sexual assault while armed, one count of abduction of a child, and one count of impersonating a peace officer. Smith pled not guilty and the case was set for trial. Several delays followed. The trial court granted two motions to adjourn the trial and eventually a third trial date was set. On that date, the State filed an amended information reducing count one to a charge of third-degree sexual assault while armed. Smith pled guilty to the amended charges.

¶3 During the plea hearing, the trial court conducted an extensive colloquy with Smith and his trial counsel. The trial court outlined for Smith each element of the charges and the maximum possible penalties Smith faced on each charge. Smith asserted that he understood the charges, each of the elements of the charges and the maximum penalties he faced. When the trial court inquired

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

whether Smith had reviewed the charges and the elements of each offense with his attorney, Smith responded, “Very thoroughly, yes, ma’am.” Smith stated that he understood his attorney’s explanation of each of the counts and the penalties for each count contained in the complaint. The court then explained that, with regard to sentencing, the State would be free to request the maximum penalties and the court would be free to impose the maximum penalties for these offenses. Smith again indicated that he understood.

¶4 The trial court then reviewed the guilty plea questionnaire and waiver of rights form, which Smith had signed after reviewing it with his attorney. Smith stated he understood that, by entering a guilty plea, he was waiving the rights described in the form. He informed the trial court that he was pleading guilty because he was guilty, and that he was not under the influence of drugs, alcohol or medication. Finally, in response to the trial court’s questions, Smith acknowledged that he had received treatment for depression from 1991 to 1993, but that he had not received, nor was he currently undergoing, any further treatment or counseling.

¶5 The trial court then discussed the questionnaire with Smith’s attorney, who asserted that he had reviewed each paragraph of the questionnaire with Smith and he was comfortable that Smith understood the rights waived by entering a guilty plea. Counsel stated that he had also reviewed each of the charges and the elements of the charges with Smith, and he believed that Smith understood his explanation. On the record, counsel related that he had reviewed with Smith the various advantages and disadvantages of going to trial, as well as the evidence available to the State to prove its case. Finally, counsel indicated that, in his opinion, Smith was pleading guilty freely, knowingly and intelligently.

¶6 Based on its colloquy with Smith and his attorney, the trial court approved the waiver of rights and found that Smith entered his plea freely, voluntarily and intelligently. The trial court found that the criminal complaint provided the factual basis for accepting Smith's guilty plea. The trial court then found Smith guilty of all three charges and ordered a presentence investigation report (PSI) and set a date for sentencing.

¶7 At the sentencing hearing, the trial court was informed that Smith had denied any involvement in the crimes to the writer of the PSI, and that he claimed he had pled guilty because he did not think he could get a fair trial. The trial court again engaged in an extensive colloquy with Smith regarding these claims, and Smith indicated that he wished to proceed with sentencing, despite his earlier statements. The trial court declined Smith's request to proceed immediately, expressed its discomfort with sentencing Smith after reading of his assertions, and adjourned sentencing until the following week.

¶8 When Smith returned for sentencing, he informed the trial court that he now wished to withdraw his guilty pleas and the matter was, once again, adjourned. Following a hearing, the trial court denied Smith's motion to withdraw his guilty pleas and sentenced him to nine years' imprisonment on count one; six years consecutive on count two; and nine months consecutive on count three.

¶9 Smith then obtained new counsel and filed a postconviction motion claiming that the trial court erred in denying his presentence motion to withdraw his guilty pleas. Smith also argued that he was entitled to post-sentence plea withdrawal to correct a manifest injustice based on his trial counsel's ineffective assistance and because his guilty pleas had not been entered knowingly and

voluntarily. The trial court denied Smith's postconviction motion without a hearing.

II. ANALYSIS.

¶10 Smith first argues that the trial court erred in denying his motion to withdraw his guilty pleas prior to sentencing. "Wisconsin precedent teaches that the criterion for withdrawal of a guilty plea prior to sentencing is whether the defendant has shown a fair and just reason for withdrawal." *State v. Shanks*, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). "When the necessary showing is made, the defendant should be permitted to withdraw his guilty plea unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." *Id.* at 288-89. The trial court's decision to grant or deny plea withdrawal prior to sentencing is discretionary and will be sustained by this court absent an erroneous exercise of discretion. *Id.* at 289.

¶11 Smith asserts that in denying his presentence motion to withdraw his guilty pleas, "the trial court applied an erroneous standard." Specifically, Smith points to the trial court's finding that, although he had not demonstrated a "fair and just reason" to withdraw his guilty pleas, even if he had met this burden, "the impact on the victim [in] this case and the ... aging of this case ... constitutes *some* prejudice to the state." (Emphasis added.) Smith contends that by construing the standard to require the State to demonstrate "some prejudice" instead of "substantial prejudice," the trial court applied "an erroneous view of the law and constituted an improper exercise of discretion." We reject Smith's argument.

¶12 The trial court's mistaken reference to "some prejudice" is legally superfluous. As set forth in *Shanks*, the trial court will not consider the potential

prejudice to the State in allowing the defendant to withdraw his plea prior to sentencing unless and until the defendant has demonstrated a fair and just reason for withdrawing his or her plea. *Id.* at 288. Here, the trial court determined that Smith failed to demonstrate a fair and just reason for withdrawing his guilty pleas and, therefore, the trial court was not required to proceed to the second step to consider the potential prejudice to the State. Thus, we reject Smith's argument that the trial court applied an erroneous standard.

¶13 Moreover, we are satisfied that the trial court properly exercised its discretion in finding that Smith had failed to demonstrate a fair and just reason for withdrawing his guilty pleas. In order to meet this burden, Smith was required to demonstrate “some adequate reason for [his] change of heart ... other than the desire to have a trial.” *State v. Garcia*, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995) (citation omitted). Smith argues that he was entitled to plea withdrawal because he was emotionally and mentally unstable when he pled guilty; he only pled guilty because of the financial burden upon his family members who were paying his legal fees; and he continuously asserted his innocence, claiming that he only pled guilty because he did not believe he could get a fair trial. We reject Smith's arguments.

¶14 The trial court correctly determined that Smith failed to establish a fair and just reason for withdrawing his guilty pleas. The trial court considered Smith's assertion of innocence, which the court noted was clearly in his favor, but by itself, was not dispositive. *Shanks*, 152 Wis. 2d at 290. The court also remarked on the absence of incriminating statements made by Smith since he entered his pleas; Smith's unequivocal assertion at sentencing that he understood the consequences of his pleas; his failure to assert, prior to his postconviction motion, that his pleas were not entered knowingly, intelligently or voluntarily; the

timing of his pleas; and the absence of evidence of coercion on the part of Smith's trial counsel. *Id.* Ultimately, the trial court concluded:

But clearly this is not a case where there was a swift change of heart indicating that the plea was entered in some kind of haste or confusion. Indeed what the record seems to show more than anything else is that the defendant evaluated the circumstances ... and felt that the best thing was to enter a guilty plea on that day.

I have felt some real concern about this because, obviously, I feel much more comfortable imposing sentence in a case where a defendant is not asserting his innocence. But I do not believe that the circumstances as they exist[ed] warrant my finding that there [was] a fair and just reason to permit [Smith] to withdraw the guilty plea.

We agree with the trial court's thorough and well-reasoned analysis and, therefore, we conclude that the trial court properly denied Smith's motion to withdraw his guilty pleas before sentencing.

¶15 Smith next argues that the trial court erred in denying his motion to withdraw his guilty pleas after sentencing. Specifically, Smith argues that his guilty pleas were involuntary and that he received the ineffective assistance of trial counsel. We disagree.

¶16 To withdraw a guilty plea after sentencing, the defendant must show that a manifest injustice would result if the trial court did not permit the withdrawal. *State v. Booth*, 142 Wis. 2d 232, 235, 418 N.W.2d 20 (Ct. App. 1987). The defendant bears the burden of proving a manifest injustice by clear and convincing evidence, and the court's decision not to allow the defendant to withdraw his plea will only be reversed for an erroneous exercise of discretion. *Id.* at 237.

¶17 In order to establish that his guilty pleas were not entered knowingly, intelligently and voluntarily, the defendant must first make a prima facie showing that the trial court failed to accept his pleas in conformance with WIS. STAT. § 971.08 and “other mandatory duties.” *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). If the defendant makes the requisite showing, the trial court must then determine “whether he has properly alleged that he, in fact, did not know or understand the information which should have been provided at the plea hearing.” *Id.* Further, while the ineffective assistance of counsel can constitute a manifest injustice, in order to establish a manifest injustice based on the ineffective assistance of counsel, the defendant is required to demonstrate that trial counsel’s performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Here, we are satisfied that the trial court properly exercised its discretion in denying Smith’s post-sentence motion to withdraw his guilty pleas.

¶18 The record clearly belies Smith’s allegations that his guilty pleas were not entered knowingly, intelligently and voluntarily, and that his trial counsel was ineffective. First, the record demonstrates that in accepting Smith’s guilty pleas the trial court satisfied the requirements of WIS. STAT. § 971.08 and *Bangert*. Our independent review of the record leaves no doubt that Smith pled guilty knowingly, intelligently and voluntarily. Specifically, as noted, the trial court engaged in an extensive colloquy with Smith and his trial counsel. Both Smith and trial counsel repeatedly asserted that Smith understood the actual charges, the elements of each offense and the potential penalty. Smith also signed a guilty plea questionnaire and waiver of rights form after reviewing it with his attorney. *State v. Moederndorfer*, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987) (One of the ways a trial court may fulfill its obligations under *Bangert*

is by making reference to a signed waiver of rights form.). Finally, Smith expressly asserted that he was pleading guilty because he was guilty. Therefore, the record resoundingly demonstrates that Smith entered his pleas knowingly, intelligently and voluntarily, and we reject his arguments to the contrary.

¶19 Second, Smith failed to establish that his trial counsel was ineffective. Smith argues that trial counsel was ineffective for: (1) leaving him to argue his plea withdrawal motion *pro se*;³ (2) failing to adequately investigate in preparation for trial; and (3) failing to investigate serious concerns regarding his mental and physical health in preparation for sentencing. However, even if we were to accept Smith's assertions that counsel's errors constituted deficient performance, Smith fails to allege that counsel's errors were prejudicial. Specifically, Smith failed to allege that but for trial counsel's alleged errors, he would not have pled guilty. *See Strickland*, 466 U.S. at 694 (to prove prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

³ In its brief to this court, the State correctly asserts that Smith misconstrues the record in arguing that his trial counsel left him to argue his plea withdrawal motion *pro se*. Smith's trial counsel did refer to Smith proceeding *pro se*; however, when considered in proper context, it is clear that counsel was simply summarizing an earlier appearance and was not leaving Smith to argue his motion *pro se*:

We then came back on the 11th, and you inquired at that time whether or not Mr. Smith still wanted to proceed with this sort of a pro se oral motion to withdraw his plea. Mr. Smith indicated that he wanted to do so. And at that time I think you asked the court reporter to produce a transcript of the proceedings, of the plea proceedings, which I did obtain, which I reviewed, and asked us to come back on today's date.

The remainder of the transcript of the hearing clearly shows that Smith's trial counsel did not leave Smith to argue his motion *pro se*, but rather counsel argued at length that Smith should be allowed to withdraw his guilty plea based on the factors set forth in *State v. Shanks*, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989).

Therefore, Smith has failed to satisfy the prejudice prong and we conclude that trial counsel was not ineffective.

¶20 For these reasons, we are satisfied that Smith has failed to demonstrate a manifest injustice and, therefore, the trial court properly denied his post-sentencing motion to withdraw his guilty pleas.

¶21 Finally, Smith argues that the trial court erred in denying his postconviction motion to withdraw his guilty pleas without a hearing. The trial court is required to hold an evidentiary hearing only if a defendant's motion alleges facts which, if true, would have entitled him to relief. *State v. Bentley*, 201 Wis. 2d 303, 309, 548 N.W.2d 50 (1996).

“However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.”

Id. at 309-10 (citation omitted). Smith maintains that he was entitled to an evidentiary hearing because his “postconviction motion, brief, affidavit and the record” alleged sufficient facts, which, if true, entitled him to relief. Further, Smith asserts that the trial court’s finding that his motion was “wholly conclusory and completely speculative,” was erroneous. However, because we have already determined that Smith’s allegations of ineffective assistance of counsel are wholly conclusory, and that the record conclusively demonstrates that he is not entitled to relief, we conclude that the trial court properly denied Smith’s motion without a hearing.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

